**Nos. 16-5149/16-5150/16-5151/16-5152/16-5153/
16-5154/16-5155/16-5156/16-5157/16-5158**

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAMILTON COUNTY EMERGENCY COMMUNICATIONS DISTRICT, et al.,
Plaintiffs-Appellants,

v.

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T TENNESSEE,
Defendant-Appellee.

On Appeal from the United States District Court
Eastern District of Tennessee, Chattanooga Division
Case No. 1:11-cv-00330 (Lead) (The Honorable Curtis L. Collier)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND REHEARING

STEVEN P. LEHOTSKY
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

April 14, 2017

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 26.1, The Chamber of Commerce of the United States of America makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None.

Dated: April 14, 2017

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

TABLE OF CONTENTS

Page

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE PANEL'S DECISION CONFLICTS WITH PRECEDENT FROM THE U.S. SUPREME COURT, THE TENNESSEE SUPREME COURT, AND THIS COURT 3

II. THE PANEL'S DECISION RISKS SIGNIFICANT HARM TO IMPORTANT PUBLIC AND PRIVATE INTERESTS 9

A. The Panel's Decision Will Impose Significant Negative Consequences On American Companies 9

B. The Panel's Decision Flouts Essential Principles Of Separation Of Powers And Federalism 10

CONCLUSION 11

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Page(s)

Alden v. Maine, 527 U.S. 706 (1999) 11

Alexander v. Sandoval, 532 U.S. 275 (2001)...3, 7

Brown v. Tennessee Title Loans, Inc., 328 S.W.3d 850 (Tenn. 2010) 6

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)..9

Ergon, Inc. v. Amoco Oil Co., 966 F. Supp. 577 (W.D. Tenn. 1997) 4

Filarsky v. Delia, 566 U.S. 377 (2012)...10

Gonzaga University v. Doe, 536 U.S. 273 (2002) 3

Hardy v. Tournament Players Club, 2017 WL 922482 (Tenn. 2017)...............4, 5, 8

Laborers' Local 265 Pension Fund v. iShares Trust, 769 F.3d 399 (6th Cir. 2014) 4, 6, 8

Mik v. Federal Home Loan Mortgage Corp., 743 F.3d 149 (6th Cir. 2014) 4, 6

Morrison v. City of Bolivar, 2012 WL 2151480 (Tenn. Ct. App. 2012)...................5

Premium Finance Corp. of America v. Crump Insurance Services, 978 S.W.2d 91 (Tenn. 1998) 5

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008)...4, 9, 10

United States v. Bormes, 133 S. Ct. 12 (2012) 6

STATUTES AND RULES

Tenn. Code Ann.
§§ 7-86-101 *et seq.* 1
§ 7-86-102...8
§ 7-86-110..7, 8
§ 7-86-302...8

Fed. R. App. P. 29 1

OTHER AUTHORITIES

Minow, Martha, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229 (2003)...10

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.[1]

This case presents a question of exceptional importance to the Chamber's members: whether plaintiffs may use private lawsuits to enforce statutory requirements against a business when the legislature has declined to provide for private right of action. In this case, Plaintiffs-Appellants Emergency Communications Districts ("Districts") allege that Defendant-Appellee BellSouth violated its obligations under the Emergency Communications District Law ("Tennessee 911 Law"), Tenn. Code Ann. §§ 7-86-101 *et seq.*, yet the Districts concede that the statute does not expressly grant them a right of action to enforce

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

the 911 Law against BellSouth. Instead, they contend that their right to sue is implied under the statute.

The panel agreed with the Districts, holding that the lack of a statutory provision authorizing their lawsuits posed no obstacle—and in doing so opened up a conflict with decades of state and federal jurisprudence. By departing from that well-established precedent, the panel's decision will cause significant harm to businesses by imposing the prospect of substantial litigation costs on companies that, until now, could not have reasonably expected to be sued under statutes with no express right of action. Allowing the panel's decision permitting such claims to stand risks exposing any company that assists local governments pursuant to a state statute to costly and unanticipated litigation. The Chamber urges this Court to grant rehearing and hold that the Districts' suit is not authorized under the 911 Law.

SUMMARY OF ARGUMENT

The panel erred in finding a private right of action against BellSouth under the 911 Law. Courts may only rarely find an implied right of action where the legislature has chosen not to create one expressly, and the panel offers no sound reason to do so here. An implied right of action is particularly inappropriate here because the text of the 911 Law demonstrates that the legislature knew how to create a right of action, but chose to create one only against telephone customers

who fail to pay the required 911 charges, not against telephone companies. The panel's decision to the contrary conflicts with decades of precedent from this Court, the U.S. Supreme Court, and the Tennessee Supreme Court. In departing from that well-established precedent, the panel's decision both runs afoul of essential principles of separation of powers and federalism, and disregards the risk of massive, unanticipated costs it would now impose on businesses that have structured their operations based on settled expectations of the law. The Court should grant rehearing and reverse the panel's opinion.

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH PRECEDENT FROM THE U.S. SUPREME COURT, THE TENNESSEE SUPREME COURT, AND THIS COURT

The panel's decision flouts a bevy of federal and state precedents that counsel against implying a right of action under statutes that, like the 911 Law, refrain from providing an express right of action. It creates a conflict with several recent decisions from both this Court and the Tennessee Supreme Court. Rehearing is appropriate to eliminate this unnecessary conflict.

The U.S. Supreme Court has repeatedly cautioned against judicial recognition of implied rights of action. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit[.]"); *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001) ("[P]rivate rights of

action to enforce federal law must be created by Congress," even if a right of action might be "desirable … as a policy matter" or "compatible with the statute."). That is because "the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute [the legislature] has not assigned it to resolve.'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).[2]

Until the panel's decision, this Court's approach in this area had been right in line with the Supreme Court's admonitions—treating claims of implied rights of action skeptically, and refusing to find such rights of action absent clear indicia of legislative intent. *See, e.g.*, *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 407-408 (6th Cir. 2014) ("The threshold question is thus whether the text or the structure of the [statute] indicates an intent by Congress to create an implied private right of action[.]"); *Mik v. Federal Home Loan Mortg. Corp.*, 743 F.3d 149, 159 (6th Cir. 2014) ("'Unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'").

---

[2] Although this case involves a Tennessee statute, federal decisions are instructive because, "[t]o determine whether a state statute implies a private right of action, Tennessee courts have utilized the standard created by the United States Supreme Court." *Ergon, Inc. v. Amoco Oil Co.*, 966 F. Supp. 577, 583 (W.D. Tenn. 1997); *see also Hardy v. Tournament Players Club*, 2017 WL 922482, at *11 (Tenn. Mar. 8, 2017) (relying on federal precedent to conclude that a Tennessee law contained no implied right of action).

Tennessee courts have been equally reluctant to read a right of action into a statute that does not expressly provide one. *See, e.g.*, *Premium Fin. Corp. of Am. v. Crump Ins. Servs.*, 978 S.W.2d 91, 93 (Tenn. 1998) ("Where a right of action is dependent upon the provisions of a statute, our courts are not privileged to create such a right under the guise of liberal interpretation of the statute."); *Morrison v. City of Bolivar*, 2012 WL 2151480, at *5 (Tenn. Ct. App. June 14, 2012) ("The authority to create a private right of action pursuant to statute is the province of the legislature.").

While the federal and Tennessee courts may, long ago, have embraced the freewheeling approach to implied rights of action employed by the panel—finding such rights "so long as doing so is not inconsistent with either the purpose of the statute or any criminal or administrative remedies expressly provided in the statute," *Hardy v. Tournament Players Club*, 2017 WL 922482, at *14 (Tenn. Mar. 8, 2017)—they have both since abandoned that position in favor of one more hostile to inferring causes of action not expressly provided for by the legislature. As the Tennessee Supreme Court has repeatedly instructed, including in a decision earlier this year, the focus of analysis must be on the question of legislative intent, rather than on an open-ended "purpose" inquiry. *See, e.g.*, *id.* ("[C]ourts in Tennessee and elsewhere have 'retreated' from this approach in favor of one that

generally presumes that the legislature will expressly provide for a private remedy if its intends there to be one.”).

That skepticism of implied rights of action is at its zenith when the statute provides for an alternative remedy. “Where the ‘liability is one created by statute,’ the ‘special remedy provided by the same statute is exclusive.’” *United States v. Bormes*, 133 S. Ct. 12, 18 (2012); *see also Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 860 (Tenn. 2010) (“‘[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.’”). And a right of action should never be implied where, as here, the legislature has explicitly created another right of action in the same statute. *See, e.g.*, *Laborers’ Local 265*, 769 F.3d at 408.

This case, therefore, should have been an easy one. *First,* the panel recognized that Tennessee’s 911 Law “contain[s] no express right of action” for the Districts to enforce the statute against telephone companies such as BellSouth. Panel Op. 4 (emphasis omitted). *Second*, the panel acknowledged that it “d[id] not find a compelling indication one way or the other of legislative intent to create or deny [a] private right of action.” *Id*. at 11.[3] And *third*, the panel observed that the 911 Law expressly grants the Districts a right of action against telephone

[3] Under recent Sixth Circuit precedent, this concession alone should have been sufficient to end the panel’s inquiry. *See Mik*, 743 F.3d at 159.

customers who fail to pay the 911 service charge, *see* Tenn. Code Ann. § 7-86-110(c) (Districts are "authorized to demand payment from any service user who fails to pay any proper service charge, and *may take legal action, if necessary, to collect the service charge from such service user*" (emphasis added)), but includes no corresponding provision granting a right to sue telephone *companies* for failing to bill 911 service charges. Panel Op. 11. Had this case been decided by the U.S. Supreme Court, the Tennessee Supreme Court, or even a different panel of this Court, the Districts' claims would have been dismissed.

But this panel permitted the Districts' suit to go forward because it thought the action "consistent with the underlying purpose" of the statute. Panel Op. 12. The panel reasoned that because "the Districts' most expedient and effective means of compelling the phone companies is a private right of action," the lack of textual support or indicia of legislative intent was irrelevant. *Id.*. The law would work better, the panel thought, if the Districts were permitted to sue, and so permit them to sue it did. *See id.* (allowing the suits would "effectuate [the law's] requirements and serve its purposes"),

The panel's purposed-based approach goes doubly astray. As an initial matter, both the federal and Tennessee courts have long since "abandoned" the notion that courts should "'provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Sandoval*, 532 U.S. at

287; *see Hardy*, 2017 WL 922482, at *14. And this Court's recent precedent is much the same. *See Laborers' Local 265*, 769 F.3d at 408 (statute's "broad remedial purposes" insufficient to support an implied cause of action).

In any event, the panel's recognition of a private right of action actually conflicts with the 911 Law's purpose. As the statute itself explains, the law's purpose is "the establishment of a uniform emergency number to shorten the time required for a citizen to request and receive emergency aid." Tenn. Code Ann. § 7-86-102(a). An implied right of action against BellSouth undermines precisely that goal: District-by-district enforcement would yield piecemeal litigation and potentially conflicting interpretations of the 911 Law. When the Tennessee legislature amended the statute in 2014, it created a statewide "emergency communications board" to avoid this piecemeal approach and instead ensure uniform enforcement. *See id.* §§ 7-86-110(a), 7-86-302(a). Permitting the Districts to pursue independent litigation would disrupt the legislature's object of facilitating uniform application of the 911 Law. Rehearing is warranted to undo this unforced error.

II. THE PANEL'S DECISION RISKS SIGNIFICANT HARM TO IMPORTANT PUBLIC AND PRIVATE INTERESTS

A. The Panel's Decision Will Impose Significant Negative Consequences On American Companies

Courts have long warned of the baleful consequences of expanding private enforcement of statutes through judicial fiat. When a statute does not expressly confer a right of action, judicial recognition of such a right disrupts the expectations of would-be defendants, who are suddenly forced to grapple with "extensive discovery," "the potential for uncertainty and disruption," and other litigation-related burdens that substantially raise the "costs of doing business." *Stoneridge*, 552 U.S. at 163-164. Often, these burdens will be sufficiently onerous as to "allow plaintiffs with weak claims to extort settlements from innocent [defendants]." *Id.* at 163. When the defendant is a business, moreover, the costs of defending against such litigation will be either absorbed (and thus borne by investors and employees) or passed on to consumers. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

Those costs lead to real harm—even beyond the obvious financial losses. Local governments frequently turn to private companies to provide goods and services in a cost-effective, high-quality, and reliable manner. Private companies, for example, manage public schools, oversee welfare programs, provide drug-abuse counseling, and offer employment training. *See generally* Minow, *Public*

and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1231-1232, 1267 (2003). The practical effect of the panel's reasoning is to expose any such company that assists local governments pursuant to a statute to the risks of costly and unanticipated litigation. This would create a serious disincentive for such companies to engage in business with local governments in the first place, to the detriment of municipalities and their residents.

B. The Panel's Decision Flouts Essential Principles Of Separation Of Powers And Federalism

In addition to disrupting the public-private relationships that have long contributed to the well-being of the country and its citizens, the panel's decision transgresses important separation of powers and federalism limitations. As the Supreme Court has explained, every private right of action case implicates separation-of-powers concerns because "the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute [the legislature] has not assigned it to resolve.'" *Stoneridge*, 552 U.S. at 164. All the more so here, when the target of the lawsuit is a private entity that has been compelled to act as a middleman for local governments: As has long been recognized, it is the political branches' responsibility to determine the mechanisms for ensuring businesses' compliance with the law. And, as the Supreme Court has recently explained, there are good reasons for those branches to opt against doing so through private lawsuits. *See Filarsky v. Delia*, 566 U.S. 377, 390-391 (2012)

(disallowing such suits "serves to 'ensure that talented candidates are not deterred by the threat of damages suits from entering public service'"). By creating a right of action that does not exist as a matter of statute, the panel impermissibly substituted its judgment for that of the legislature.

Still more, the panel second-guessed the judgment of a *state* legislature, thus flouting not only the ordinary separation of powers principles, but also principles of federalism. As the Supreme Court has cautioned, "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government." *Alden v. Maine*, 527 U.S. 706, 751 (1999). Yet the panel here did just the opposite: replacing the Tennessee legislature's decision to omit a cause of action against telephone companies with its own judgment that such a right of action would be the "most expedient and effective" method of achieving the statute's goals. Panel Op. 12. That federal judicial aggrandizement calls out for rehearing and reversal.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and reverse the panel's decision.

Respectfully submitted,

/s/ Jonathan G. Cedarbaum

STEVEN P. LEHOTSKY
SHELDON GILBERT
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

Dated: April 14, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(b)(4).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2016.

2. Excluding the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Sixth Circuit Rule 32(b)(1), the brief contains 2,571 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2016 in preparing this certificate.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM

Dated: April 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2017, I electronically filed the foregoing Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case will be served by the appellate CM/ECF system.

/s/ Jonathan G. Cedarbaum
JONATHAN G. CEDARBAUM